***THE HONBLE Ms. JUSTICE G.ROHINI**

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+ WRIT PETITION No.23262 OF 2005

%Dated 01-12-2005

Cable Corporation of India Limited, a company
incorporated under the Companies Act, 1956
having its Registered Office at Laxmi Building,
6, Shoorji Vallabhdas Marg, Ballard Estate,
Mumbai – 400 001, represented by its
Regional Manager – Southern Region,
Mr.V.Prasad. … Petitioner

Versus

$ Transmission Corporation of Andhra Pradesh
Limited, a Govt. of A.P. undertaking, rep. by its
Chief Engineer – Construction Vidyut Soudha,
Khairatabad, Hyderabad-500 082. … Respondent

! Counsel for Petitioner : Sri C.R. Sridharan

^Counsel for Respondent: Sri M.Sreeramulu Reddy,
Standing Counsel for AP Transco

<GIST:

> HEAD NOTE:

? Cases referred

(1994) 6 SCC 651;

2 2000 (2) SCC 617;

3 (2004) 4 Supreme Court Cases 19

4 (2005) 1 Supreme Court Cases 679

THE HON'BLE Ms. JUSTICE G. ROHINI

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Dated : 1st December, 2005.

Between:

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And

Transmission Corporation of Andhra Pradesh
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ORDER :

The respondent – Transmission Corporation of A.P. Limited issued Tender Notice No.APT 13/2005 dated 30-05-2005 inviting sealed bids for the supply and laying of 220 KV, 1000 Sq.mm XLPE underground copper cable with associated accessories including services for laying, jointing, terminations, site testing, commissioning the complete cable system for a quantity of 33 kms.

The petitioner-company claims to have engaged in the business of manufacture,

supply and installation of electric cables of various specifications for the past four decades. It is also claimed that it executed works / contracts with various Government Agencies including Electricity Boards throughout the country particularly of manufacturing and laying cables of 220 KV. It has its factory at Borivali, Mumbai and has got the manufacturing facility for manufacturing specialised cables particularly required by the various Electricity Boards.

In the present writ petition, the petitioner seeks to challenge some of the Qualification Requirements imposed under the Tender Notice dated 30-5-2005 issued by the respondent contending that the said conditions are wholly unreasonable, arbitrary and discriminatory. The said conditions specified under the Qualification Requirements in Section-VI of the Notice Inviting Bids (NIB) are as under :

> *1.a.i) The Bidder should be a manufacturer who must have designed, manufactured, tested and supplied at least 13 KM of 220 KV, 1000 Sq.mm, or higher voltage grade XLPE insulated, copper U/G cable in any one of the last five financial years. At least 6 KM of 220 KV, 1000 Sq.mm, or higher voltage grade XLPE insulated, copper U/G cable should be in successful operation for at least two years.*
>
> *a.iii) The Bidder should have satisfactorily completed laying of at least 5 Circuit KM of 220 KV or higher voltage XLPE U/G cable as a prime contractor in any one of the last five financial years, which is in successful operation for more than two years.*
>
> *4) All the offered Cable and Accessories shall be fully type tested by the bidder as per the relevant standards including the type tests mentioned below. The type tests must have been conducted on the offered cable & Accessories, from the reputed International Test Laboratories mentioned at 6.1.3 (Technical part of this specification), not earlier than 2000. The bidder shall furnish two sets of above type test reports along with the bid. The offers received without these type test reports shall be treated as Non-Responsive.*

The petitioner is also aggrieved by Clause 6.2.1 – C (b) of Section-VII of Technical Specification which contains one of the type tests on cable system, which runs as

under :

“Pre-qualification tests on complete cable system as per IEC 62067.”

The petitioner contends that the above Qualification Requirements are palpably arbitrary, capricious and wholly unreasonable which have the affect of eliminating Indian participation in the contract. It is also contended that the above conditions do not have any rationale and have no nexus to the object sought to be achieved. It is further contended that the conditions are impossible of performance by the Indian Companies and thus they are intended only to eliminate participation by Indian Companies and to the detriment of the public interest because of the cost escalation on account of exclusive foreign participation.

It is stated that the petitioner-company is the only Indian company having full potential to manufacture the specialized cables required under the impugned tender notice indigenously and in a most cost effective manner. It is claimed that it is in a position to perform to the fullest satisfaction of all the concerned as it has the technical know-how and capabilities comparable to any other international organisations. However, Clause 1.a.i of Qualification Requirements which requires that the manufacturer must have designed, manufactured, tested and supplied at least 13 kms of 220 KV, 1000 Sq.mm copper underground cable in any one of the last five financial years and at least 6 kms of the same size to be in successful operation for at least two years is impossible of compliance by any Indian Company since no orders for such cables in India have been placed within the last five years. Since there has been no opportunity for an Indian Manufacturer to have supplied the above specific size of cable and quantity, there is an impossibility of performance in meeting the said clause by any Indian Manufacturing Company including the petitioner-company. Similar contentions have been raised with regard to compliance of Clause 1.a.iii, Clause-4 and Clause 6.2.1 – C (b) of Technical Specification, the validity of which is under challenge in this writ petition.

The petitioner states that it made representations dated 2-6-2005, 13-6-2005 and 16-8-2005 pointing out the unreasonable, discriminatory and arbitrary conditions and requesting the respondent to amend the Qualification Requirements. However, the respondent declined to consider the request of the petitioner, though certain general

clarifications / amendments were issued to the queries raised by the prospective bidders on 19-8-2005. Hence, this writ petition with the following prayer :

> *"a) declaring the Clauses 1.a.i), 1.a.iii) & 4 of Section VI and Clause 6.2.1 C(b) of Section VII – Technical Specification of the Tender Notice No.APT 13/2005 dated 30-5-2005 issued by the respondent as illegal, arbitrary, void, discriminatory and unconstitutional and consequential direction to the respondent herein to accept the bid of the petitioner and evaluate the same without reference to Clauses 1.a.i), 1.a.iii) & 4 of Section VI – Qualification Requirements and Clause 6.2.1. C(b) of Section VII – Technical Specification of the Tender Notice No.APT 13/2005 dated 30/05/2005;*
>
> *b) direct the respondent herein to modify the qualification relating to Qualification Requirements under Clauses 1.a.i), 1.a.iii) & 4 of Section VI and Clause 6.2.1 C(b) of Section VII – Technical Specification of the Tender Notice No.APT 13/2005 dated 30/05/2005 and consequently allow the petitioner to participate in the tender process without insisting on the aforesaid conditions;*
>
> *and pass such further or other order/s as may be deemed fit and proper in the facts and circumstances of the case, while awarding costs of these proceedings and render justice."*

On behalf of the respondents, the Chief Engineer (Construction), A.P. Transco filed a counter-affidavit stating that the impugned Tender Specification APT 13/2005 was prepared based on the purchase manual of A.P. Transco and the technical part of it was prepared based on IS 7098 par-3, IEC 62067 and other related standards. Before publishing the tender notice in news papers and web site the present specification was prepared and put before the Technical Committee of A.P. Transco consisting of three Technical Directors for approval. After obtaining approval of Technical Committee, the Tender Notice inviting bids was published in the website and newspapers on 30-5-2005 and the specification was kept in website.

It is further stated that as per the specification tendering procedure, pre-bid conference was held on 15-6-2005 to clarify the doubts/queries of the prospective bidders. The representatives of seven companies attended the meeting. Except the petitioner company no other bidder requested for relaxation of the qualifications. In the pre-bid conference and again through letters dated 2-6-2005, 13-6-2005, 15-6-2005 and 16-8-2005 the petitioner represented for relaxing the Qualification Requirements of the specification. The Technical Committee of A.P. Transco

examined the representation of the petitioner company to relax the Qualification Requirements on 7-7-2005 and 13-7-2005 and finally the subject was discussed in the internal board meeting of A.P. Transco on 6-8-2005 and it was decided not to relax the qualification and other technical clauses of the specification. The same was informed to the petitioner company along with other technical queries arose in the pre-bid conference and the same was kept in the website.

It is further stated that the present tender is not a global tender but with the domestic funding and the payment and other clauses are of national competitive bidding nature. That apart, more than five Indian bidders have downloaded the specification from website and informed that they are interested in participating in the tenders. Hence, the allegation that the respondent has intended to eliminate Indian bidders is incorrect. It is also stated that in the last five years more than 500 KM of 220 KV cables, tenders were floated in India itself and as per Indian Standards of International Standards like International Electro-Mechanical Commission Type Test are important for judging the quality of the materials before placing the order. Hence, the petitioner cannot be granted any relief relaxing the qualification and technical requirements as sought by it.

I have heard the learned Counsel for both the parties and perused the material on record.

The law relating to the scope of judicial review with regard to the awarding of contracts by the State and its instrumentalities is well-settled. In TATA CELLULAR VS. UNION OF INDIA, the apex Court having considered the said issue in detail laid down the following principles:

> *"…1. The modem trend points to judicial restraint in administrative action.*
>
> *2. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *3. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is*

permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

4. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

5. The government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

6. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

Again in AIR INDIA LIMITED vs. COCHIN INTERNATIONAL AIRPORT LIMITED, the Supreme Court after reviewing all the relevant decisions on the said aspect, reiterated the principles governing the award of contract by the State and its instrumentalities as under :

"..The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that it is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms; standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The

court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

It is also a settled principle of law that the tender conditions cannot normally be subjected to judicial scrutiny unless they are so arbitrary or irrational or ex facie in violation of Article 14 of the Constitution of India. As held in DIRECTORATE OF EDUCATION v. EDUCAMP DATAMATICS LTD. the Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.

In the case on hand, it is clear from the counter-affidavit filed on behalf of the respondent that the tender specification was prepared as per the purchase manual of A.P. Transco and the technical part was as per international standards and that the Technical Committee of A.P. Transco approved the same before publishing the tender notice. It is also clear that except the petitioner- company, no other bidder requested for relaxation of the Qualification Requirements. Moreover, it is not in dispute that under the impugned tender notice, joint ventures with foreign collaborations are also permitted to participate. It is also the specific case of the respondent that more than five Indian bidders participated in the tenders and that in the last five years more than 500 Km of 220 KV cables, tenders were floated in India itself. In the circumstances, the grounds on which the petitioner seeks relaxation of the Qualification Requirements do not appear to be genuine. Admittedly, the petitioner-company does not meet the requirements of the prescribed specifications and therefore the action of the respondents in not considering the request of the petitioner to relax the qualification cannot be said to be arbitrary or illegal since the same would amount to benefit one of the disqualified bidders. As a matter of fact, the Technical Committee of the respondent-Corporation examined the representation of the petitioner-company and in the internal Board Meeting held on 6-8-2005 it was decided not to relax the qualification and other technical clauses of the specification. This Court in exercise of jurisdiction under Article 226 of the Constitution of India will not sit in appeal and substitute its own opinion to that of such expert body. From the counter-affidavit, it is clear that the respondent-Corporation has prescribed the

specifications under the tender notice, keeping in view the nature of the work i.e., an important sub-station which shall cater the power to the software companies and which shall remain in the A.P. Grid for more than 50 years. Having regard to the importance of the work in question, the respondent thought it necessary to secure the best quality of the cables and accordingly incorporated the type tests and pre-qualification tests as per the international standards.

It is well settled that the State or its instrumentalities can choose their own terms of invitation to tender. As noted above, there is absolutely no reason to hold that the specifications prescribed by the respondent are either arbitrary or irrational nor it can be held that the same were prescribed to eliminate participation by the Indian Companies. The specifications also cannot be held to be unreasonable or without any nexus with the object sought to be achieved. There is also nothing on record to infer any mala fide design on the part of the respondent to favour the Foreign companies or to eliminate the Indian manufacturers. Hence, absolutely, no case is made out warranting judicial interference.

However, the learned Counsel for the petitioner contended that since the respondent declined to consider the request of the petitioner for modification only on the ground that the specification has already been published, it would be appropriate to direct the respondent to reconsider the matter on merits.

From the material placed before this Court by the respondent along with counter-affidavit, it is clear that the respondent has taken into consideration all the relevant aspects before rejecting the request of the petitioner for relaxation of the specifications. At any rate, relaxation, if any, granted would amount to benefiting one of the disqualified parties. Hence, I am unable to agree with the said submission. The learned Counsel for the petitioner while placing reliance upon a decision in ASSN. OF REGISTRATION PLATES v. UNION OF INDIA further contended that the respondent being State instrumentality is required to act reasonably, fairly and in public interest and ought to have afforded equal opportunity in competing for the contract.

It is no doubt true that, as observed by the Supreme Court in the above decision, the Government contracts are highly valuable assets and the Court should be prepared to enforce standards of fairness on the Government in its dealings with the tenderers and the contractors. However, as observed by the Supreme Court in the very same decision of ASSN. OF REGISTRATION PLATES (4 supra) pre-conditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. In the above decision, the Supreme Court while rejecting an identical contention raised by the petitioners therein that the indigenous manufacturers were discriminated, observed as under :

> *"It is not controverted that the technical "know-how" for the manufacture of high security registration plates presently is available outside India. Technically and financially, competent indigenous manufacturers are mostly those who are in collaborations with foreign companies engaged in such manufacturing activities. The scheme contemplated under Rule 50 for registration plates is a new experiment for India. In the initial stages of its implementation, tender conditions encouraging such manufacturers who are in foreign collaborations cannot be held to be discriminatory to indigenous manufacturers. Keeping in view the nature of the contract and job involved, particularly its magnitude and the huge investment for infrastructure required, attempt to select such manufacturer – may be having collaboration with foreign companies and experience in foreign countries – cannot be held to be a deliberate attempt on the part of the State authorities to eliminate indigenous manufacturers.*
>
> *In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering authority is found to be malicious and misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of the class of intending tenderers under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended*

only to keep indigenous manufacturers out of the field."

In the light of the ratio laid down in ASSN. OF REGISTRATION PLATES (4 supra) and for the aforesaid reasons, I do not find any justifiable reason to hold that the decision of the respondent in having declined to relax the Qualification Requirements and Technical Specification under the Tender Notice dated 30-5-2005 as sought by the petitioner suffers from any legal infirmity warranting interference by this Court.

Accordingly, the Writ Petition is dismissed. No costs.

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1st December, 2005.

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